Nos. 87-2050, 88-90 and 88-96

In the Supreme Court of the United States

October Term, 1988

COUNTY OF ALLEGHENY, et al.

Petitioners,

vs.

AMERICAN CIVIL LIBERTIES UNION, et al.

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Brief of Respondents American Civil Liberties Union, et al.

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QUESTIONS PRESENTED

1. Whether the Third Circuit correctly held that the Establishment Clause prohibits Allegheny County from displaying a nativity scene, composed entirely of religious symbols, on the central staircase within its Courthouse which contains its core governmental offices and its civil and criminal courts?

2. Whether the Third Circuit correctly held that the Establishment Clause prohibits the City of Pittsburgh from displaying a Chanukah menorah on the face of the City-County Building housing its core governmental offices, state civil trial courts, and the Pennsylvania Supreme Court.

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BRIEF OF RESPONDENTS AMERICAN CIVIL LIBERTIES UNION, et al.

COUNTERSTATEMENT OF THE CASE

The factual context of these consolidated cases is relatively straightforward. It is also critical to resolving the legal issues presented to this Court. Before reciting those facts in detail, therefore, it is useful to identify and correct some of the principal omissions and inaccuracies contained in Petitioners' briefs.

1. The religious symbols in this case were displayed in public buildings housing core government functions that can and often do command the attendance of certain citizens by compulsion of law (J.A. 17, 18, 121-122).[1]

2. The grand staircase on which the County displayed the nativity scene, referred to by the County as the gallery/forum area, is neither a gallery nor a forum. The staircase is just what its name ordinarily implies (J.A. 190).

3. The statement that the first floor of the Courthouse is used throughout the year for art displays and other civic and cultural events and programs (Solicitor General's Brief at 3)[2] is untrue. The art displays are in a gallery area adjacent to the grand staircase (J.A. 163, 199).

4. The nativity scene, described by the County as "a manger set" (D. Ex. I; J.E.V. 36, J.A. 172, 174),[3] is not part of some larger display nor is it in any way connected with

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[1]The abbreviation "J.A." used throughout refers to the Joint Appendix volume.

[2]S.G. hereafter designates the Solicitor General.

[3]In accordance with Supreme Court Rule 34.5 the initial citation to an exhibit indicates the page in the Joint Exhibit volume where the exhibit is reproduced and the pages in the Joint Appendix where the exhibit was offered and received. Subsequent references contain only a reference to the page in the Joint Exhibit volume at which the exhibit is reproduced.

The abbreviation "J.E.V." refers to the Joint Exhibit volume.

(Continued on next page)

the art display in the adjacent separate gallery (J.A. 197, 199, 200, D. Ex. F, G, J.E.V. 32, 33, J.A. 171, 174).

5. The nativity scene stands alone, framed only by poinsettias and greens, and has no relation to the unseen other decorations in unnamed and unidentified offices (J.A. 167, 188; P. Ex. 3-13; J.E.V. 3-8, J.A. 101, 127).

6. The City of Pittsburgh display consisted of the menorah, a Christmas tree and a sign which said:

> SALUTE TO LIBERTY
>
> DURING THIS HOLIDAY SEASON, THE CITY OF PITTSBURGH SALUTES LIBERTY. LET THESE FESTIVE LIGHTS REMIND US THAT WE ARE THE KEEPERS OF THE FLAME OF LIBERTY AND OUR LEGACY OF FREEDOM.

The sign was erected under the tree in 1986 after Respondents' letter of complaint (J.A. 219-220, P. Ex. 1; J.E.V. 1, J.A. 89).

7. There is no question that each of the challenged displays in this case is government sponsored (Menorah: City Brief at 3; Creche: County Brief at i, 2-3).

8. Contrary to the impression conveyed by the Solicitor General's "Question Presented", there was no *joint* display of the County and the City nor was there any display which included both a creche and a menorah. Rather, this action challenges the conduct of two distinct

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(Continued)

The abbreviations "P. Ex.", "D. Ex." and "Int. Ex." refer respectively to Plaintiffs' exhibit, Defendant Allegheny County's exhibit and Intervenor Chabad's exhibit.

governmental bodies for maintaining two discrete and separate displays (J.A. 62; Nativity Scene: J.A. 178-179; Menorah: J.A. 195).

1. The Nativity Scene/The County of Allegheny

Since 1981, the County of Allegheny has displayed a nativity scene, or "creche", during the Christmas season. It is displayed in an altar-like setting framed with poinsettias on the main landing of the grand staircase of the Allegheny County Courthouse (J.A. 124, 161, 164, P. Ex. 3-13; J.E.V. 3-8). The nativity scene is approximately 5 by 3 feet (9 feet including its surrounding fence), stands alone and occupies one-half or more of the grand staircase (J.A. 72, 92, 135, 164, 186). In accordance with Christian religious teachings it contains a series of figures kneeling in adoration of Mary, Joseph and the infant Jesus. The figures vary in height from 3-15 inches and are topped by an angel bearing a banner with the words from the Gospel of Luke "Gloria in Excelsis Deo" (Glory to God in the Highest) *Luke 2:14* (J.A. 74-77, P. Ex. 3-6; J.E.V. 3-4).

Father Gregory Swiderski and plaintiff Ellen Doyle, both Catholics, testified that the creche scene is indistinguishable from those commonly displayed in the Catholic church (J.A. 74-75, 93, 98). Despite the district court's suggestion that the creche merely contributes as part of an overall Christmas scene, nothing within or surrounding the creche scene reflects the non-religious aspects of the national Christmas holiday (J.A. 78).

The Allegheny County Courthouse houses the principal offices of the County—including those of the County Commissioners, the Treasurer and Controller—as well as criminal and civil courts of Allegheny County (J.A. 69). The prominent placement of the creche at the grand staircase landing assures its exposure to visitors to these offices

(J.A. 92, 123-124, 157, P. Ex. 11, 12; J.E.V. 7-8). Many such visitors must use the Courthouse under compulsion of law and thus be exposed to the creche.

The implication by Petitioner Allegheny County that the grand staircase is used "throughout the year" for art displays and other civic and cultural events and programs (County Brief at 4) is clearly misleading.[4] The County's use of the phrase "gallery/forum" does not accurately reflect the true nature of the staircase in question. In the area adjacent to the grand staircase, there is a portion of the Courthouse, referred to by the district court, used for selected art displays, but no claim has been made that the art display set up during November and December of 1986 or in previous years was in any way related to the creche or to the Christmas season (J.A. 197, 201-203).

The gratuitous reference by the County to the wreaths, trees and Santa Clauses displayed by various departments and offices throughout the Courthouse (County Brief at 3-4) is similarly misleading if meant to imply that such decorations within certain offices are somehow connected with the County's display of the nativity scene. One need only reference the photographic reproductions of the nativity scene (P. Ex. 3-13; J.E.V. 3-8) to see that in fact there is but one subject of the display, a free-standing nativity scene framed by potted poinsettias and greens.

Among those who come to the Courthouse under legal compulsion are criminal defendants, subpoenaed trial witnesses and citizens called to jury service (J.A. 21). Others

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[4]While there was testimony by one witness who recalled a sculpture's having been placed on the staircase sometime in the past (J.A. 190), the respresentative of the Cultural Affairs Department responsible for the gallery and for art displays in the Courthouse testified that she had never seen any sculpture on the stairway during her ten months' employment (J.A. 203).

who must come include persons paying county taxes, judges, lawyers trying cases, civil litigants, persons desiring to search certain court records, and those with business at the Sheriff's office (J.A. 69). Additionally, anyone whose business requires he visit the County Commissioners or the County Controller or Treasurer would follow the route leading to the creche (J.A. 96). Indeed, the nativity scene lies between the official signs designating those governmental offices (P. Ex. 11-12, J.E.V. 7-8).

The timing and erection of the nativity scene is coordinated by George N. Thomas, a County employee who discusses and schedules the timing with Father Paul Yurko, a Catholic priest and active member of the Catholic Holy Name Society. Father Yurko comes to the Courthouse as directed by the County and personally places the figures which are stored during the year by the County in the Courthouse and brought from storage to him each year (J.A. 164-166, 178-179).[5] After Father Yurko has arranged the figures, the scene is framed with poinsettias purchased and paid for by the County of Allegheny (J.A. 204).

Although the district court found that the display had a secular purpose, no testimony contradicts that of Father Swiderski and Reverend Robert Brashear, who testified that the Courthouse nativity scene is a religious symbol with no secular purpose (J.A. 78, 136). Its effect on Howard Elbling, a Jewish law clerk whose judge's chambers are within the Courthouse and who used the steps and passed

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[5]A sign beneath the creche reads: "This Display Donated by the Holy Name Society" (P. Ex. 7; J.E.V. 5). The wording of the sign has led to some ambiguity in the record as to ownership of the creche. At least one witness testified that it had been given to the County as a gift (J.A. 126). The Third Circuit, by contrast, assumed that the creche remained the property of the Holy Name Society. *American Civil Liberties Union v. County of Allegheny*, 842 F.2d 655, 657 (3d Cir. 1988).

the nativity scene four to six times a day, was expressed as follows:

> It evoked in me a feeling that I was part of a minority . . . a memory of middle ages time when my people were persecuted and forced to live in guettos (sic) (J.A. 125).

The nativity scene is displayed throughout the Christmas season, which in 1986-7 lasted from November 26 to January 9 (J.A. 179). For about half of that six-week period, during lunch time, musical groups stand before the nativity scene and sing Christmas carols and other songs. On one occasion, the creche was used as an altar for the placement of photographs of soldiers missing in action and the conduct of prayer authorized by the County employee charged with responsibility for the erection and maintenance of the creche (J.A. 188-190).

Respondents, the Pittsburgh Chapter of the American Civil Liberties Union, several lawyers whose work takes them to the Courthouse, a Unitarian minister, and a Moslem whose religion views tangible depictions of the deity as a profanity, sought to enjoin the County from erecting, maintaining and storing the nativity scene and, in a parallel suit, to similarly enjoin the City with respect to the menorah.

2. The Chanukah Menorah/City of Pittsburgh

Within the County of Allegheny, the City of Pittsburgh constitutes a municipal government (J.A. 15). The seat of that government is found at the City-County Building (J.A. 17), one block from the County Courthouse. Although the building bears the name of both governmental units, the area devoted to the display in question is maintained solely by the City of Pittsburgh (J.A. 195). All parties agree that the City and County do not join in any

sort of joint display for the Christmas or Chanukah holidays[6] (J.A. 195, County Brief at 4-5, City Brief at 3).

For a number of years during the Christmas season, the City of Pittsburgh has maintained a 45 foot Christmas tree atop a 20 by 20 foot platform on the front steps of the main entrance of the City-County Building (J.A. 206). No suit has ever been brought to challenge the propriety of the City's erection of the that tree and the present action did *not* raise that issue (J.A. 205).

Intervenor Chabad represents a small percentage of the Jewish population that follows the dictates and pronouncements of their spiritual leader, the Lubavitch Rebbe, whose declarations they believe will hasten the coming of the Messiah (J.A. 249, 252, 257). Of a total Jewish population in the Pittsburgh area of 45,000, only 100-150 families follow this form of extreme orthodoxy (J.A. 247, 251). Approximately five years ago, Chabad members undertook a program to implement a proclamation of the Rebbe exhorting them to participate in a worldwide effort to have public lightings of the Chanukah menorah (J.A. 264-266, 277).[7] In carrying out the Lubavitch Rebbe's dictates, his followers arranged with the City of Pittsburgh that it erect a large menorah (approximately 18 feet high) on the face of the arch of the main entrance to the City-County Building (J.A. 206, 290-291). The menorah, which is maintained, stored and erected by City

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[6]The "question presented" by the Amicus brief of the Solicitor General does not correctly relate to the facts of this case.

[7]Lubavitch is engaged in a "war against the forces of assimilation, helping Jews around the world to rediscover the eternal truths of Torah Judaism" (P. Ex. 18; J.E.V. 20, J.A. 285). In its Amicus brief, the American Jewish Congress gives some history of the Lubavitch movement at pp. 18, 19 n.29 and its message of proselytization is set forth in part in Plaintiff Ex. 18 reciting its mission to . . . "light up the souls of Jews . . . " (J.E.V. 19).

employees, is placed to the side of the Christmas tree (J.A. 290, 291; P. Ex. 14; J.E.V. 9, J.A. 217; Int. Ex. 1; J.E.V. 40, J.A. 213).

The City-County Building performs for the City the functions of the Allegheny County Courthouse (J.A. 114). It houses not only the offices and chambers of the Mayor and the City Council but also those of the City Treasurer, the Allegheny County Prothonotary (Clerk of Courts), the principal county civil trial courts, the marriage license bureau, the Register of Wills, and the Pennsylvania Supreme and Superior Courts (J.A. 17-18, 99).

The menorah at the City-County Building is identical to three others Chabad erects in Pittsburgh at other locations (J.A. 279-281). It has been lighted by faithful Lubavitch adherents, including its principal Pittsburgh Rabbi, who accompanied his lighting with the recitation, in Hebrew, of the religious blessing (J.A. 271-272). Rabbi Mark Staitman testified that the Chanukah menorah is clearly a religious symbol and Chabad's witness, Rabbi Yisroel Rosenfeld, acknowledged that the menorah "makes public the miracle" God performed for the Jewish people[8] (J.A. 139-141, 146, 229, 262-263). The district court acknowledged that Chabad advocates such displays to "symbolize the lighting of the souls of the Jewish people . . . " (City Cert. Pet. at 42a), and suggested that the lighting permits Jewish families to participate in the holiday lighting. *Id.* It also recognized that the Chanukah menorah may call attention to the fact that Jews also have a "miracle" to remember. *Id.* Although the Chanukah

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[8]The Jewish holiday of Chanukah commemorates the rededication of the holy Temple in Jerusalem, the miracle of God's intervention on behalf of the Jews in the Maccabean war that resulted in their victory over their enemies and the miracle that oil for the Temple's religious Menorah sufficient for burning only one day lasted instead for eight (J.A. 138-139, 141-143, 263-246).

menorah has eight as opposed to the customary seven branches of the Temple menorah, it is quite similar in shape to and easily mistaken for its more common seven branch counterpart (J.A. 139, 144, 262).

The Third Circuit reversed the district court's denial of injunctive relief. It held that in placing this creche and this menorah in and at public buildings devoted to core functions of government, both the City and the County had acted to advance religion, thus violating the Establishment Clause.

SUMMARY OF ARGUMENT

The Establishment Clause prohibits government from engaging in certain types of religious speech whether that speech is written, spoken, or by symbolic display. The County of Allegheny and the City of Pittsburgh each violated this prohibition by displaying symbols perceived as clearly religious at buildings which house their core functions of government. The Establishment Clause violation was compounded by virtue of the fact that each building is one to which some of their citizens are brought involuntarily under compulsion of law.

1. In *Lynch v. Donnelly*, 465 U.S. 668 (1984), this Court specifically rejected a *per se* endorsement of Christmas nativity scenes and, by analogy, of other religious displays. Instead, *Lynch* applied the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and stressed the importance of context in determining whether a particular religious display has the impermissible effect of advancing religion.

Each of the contextual factors cited in support of the decision in *Lynch* is absent here. Most significantly, the displays in this case are purely religious and undiluted. As a result, the placement of the nativity scene on the grand

staircase of the Courthouse and of the menorah on the face of the City-County Building unmistakably and impermissibly place the imprimatur of government on discrete religious messages.

2. Under the endorsement analysis articulated by Justice O'Connor in her concurrence in *Lynch*, the nativity scene and menorah clearly carry the messages to outsiders (and insiders) that trigger the prohibition on the government's display of religious symbols. The nativity scene, with its intense religiosity, set between signs indicating the principal offices of government, sends a message to outsiders that they are not full members of the political community. The menorah at Pittsburgh's "city hall" sends a proselytizing message to "light up the souls" of the Jewish people and is perceived in that manner by members of the community.

Even were one to accept Chabad's position that the Christmas tree adjacent to the menorah sends a countervailing religious message, the decision below is plainly correct. The government hardly satisfies its Establishment Clause obligations by broadcasting two religious messages rather than one. In either event, the message conveyed to all non-Christians and non-Jews in the Pittsburgh community is that they are outsiders simply because of their religious beliefs.

3. Petitioners' argument that these purely religious displays are somehow secularized by the "context" of Christmas clearly proves too much. Taken at face value, it would permit a state to hold a Christmas eve Mass in its courtrooms. Nothing in *Lynch* supports that extraordinary result.

4. Chabad's argument that the principal of neutrality embodied in *Larson v. Valente*, 456 U.S. 228 (1982), necessitates the erection of a menorah alongside the City's Christmas tree rests on the premise that the tree itself is a Christian religious symbol. Since this argument was not advanced in the district court, respondents submit it has not been preserved for appeal. Even were one to accept that premise, however, the cure for the government's displaying a Christian symbol cannot be the "remedy" that Chabad suggests. To say that neutrality condones, much less demands, placement of a Jewish symbol next to a Christian symbol is to totally ignore the diverse religious population among Pittsburgh citizenry. Thus, such a "solution", would hopelessly entangle government in a rivalry in which it inevitably would serve as the judge of which groups qualified as religions, which symbol properly represented each group, where placement of each and all symbols could be made to achieve neutrality, and how it could fairly and neutrally treat those religions (and non-religions) who decry any symbol.

5. In response to those who suggest a basis in history for the government's display of religious symbols here, we urge that neither display falls within the scope of any of the historical acknowledgements that have been made, nor within appropriate areas of permissible accommodation of religion. The cases which have permitted that degree of accommodation are radically different from these gratuitous government pronouncements.

6. Finally, although respondents submit that there is no real issue of a public forum since the sites used for the menorah and the creche were never made generally available for expressive activity, the 24 hour round-the-clock displays of religious symbols over a six-week period by the County of Allegheny and the City of Pittsburgh are not

justified under any application of the public forum doctrine.

ARGUMENT

I. THE DECISION BELOW CORRECTLY APPLIED *LYNCH*

A. The Majority Opinion in *Lynch* Emphasized that the "Effect" of a Religious Display Inevitably Turns on its Context.

In *Lynch*, this Court carefully avoided the sort of *per se* endorsement of nativity scenes that Petitioners and the Solicitor General now urge as the doctrine of that case. To accept their view requires rejecting former Chief Justice Burger's specific statement that "in each case, the inquiry calls for line-drawing; no fixed, *per se* rule can be framed." *Lynch*, 465 U.S. at 678. Rather than set the bright line rule posited by Petitioners, this Court, in *Lynch*, carefully stressed the fact-bound nature of its constitutional inquiry.

In *Lynch*, this Court identified a number of salient facts, none of which is present in this case. First, the Pawtucket creche was surrounded by secular symbols of the Christmas holiday season. Second, the secular message of the display was reinforced by its placement in the heart of the city's shopping district. Third, the creche was displayed in a park that was privately owned. Fourth, neither the storage nor the erection of the creche in *Lynch* involved any entanglement between government and religion.

Each of those critical factors is absent in this case. In contrast to the Pawtucket creche, the creche in this case is a purely religious symbol undiluted by any accompanying secular images. There is no Santa Claus, no reindeer or sleigh, no elves, no wooden carolers, no wishing well or teddy bear. Rather, the creche stands serene, framed by

poinsettias and greens, similar to those creches traditionally found in Catholic churches (J.A. 72-78, 98). Second, unlike Pawtucket, Allegheny County did not place its creche in a privately owned park in the heart of the city's shopping district. Instead, it located the creche in the seat of County government between signs designating the principal County offices and in the building housing its criminal and some civil courts.[9] Indeed, the fact that many citizens of Allegheny County are required to be present in the Courthouse—either by virtue of their jobs or by direct government compulsion in the form of a subpoena—makes this case analytically closer to school prayer cases with their requirement of compulsory attendance than to the Pawtucket creche case. *School District of Abington Township v. Schemmp*, 374 U.S. 203 (1963); *Illinois ex. rel McCollum v. Board of Education*, 333 U.S. 203 (1948). Third, Allegheny County was not content here to have its own employees erect the nativity scene each Christmas season. Instead, it followed a course of entanglement by effectively retaining a Roman Catholic priest to serve as its consultant on both the timing and content of the display (J.A. 164-165, 178-180).

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[9]Not only was the creche placed in the building's most beautiful location (J.A. 157), it was located on the same floor and between signs for the government's key leadership, including the Board of Commissioners, Sheriff, Treasurer, Controller, and Court Clerk (P. Ex. 11-12, J.E.V. 7-8). The setting, in short, was replete with government's presence. Using "'an unequivocal Christian symbol,' 827 F.2d at 127, so that its placement in this 'unique physical context' communicated a message of government endorsement . . . [which] '*unmistakably suggests* [the] *alliance*'" between church and state. *County of Allegheny*, 842 F.2d at 660, 661 (emphasis added) adopting the language of *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 127, 128 (7th Cir. 1987).

All of these distinctions were properly emphasized by the Court of Appeals which concluded, based on a carefully elaborated six part test derived from *Lynch*,[10] that the effect of *this* creche in *this* setting was to promote religion—indeed to promote a specific religion—in violation of the Establishment Clause. Other Courts of Appeal have applied a similar analysis and reached a similar result in the years since *Lynch*. *American Civil Liberties Union v. City of Birmingham*, 791 F.2d 1561 (6th Cir.), *cert. denied*, 479 U.S. 939 (1986); *American Jewish Congress v. City of Chicago*, *supra*.

1. *The County's and Solicitor General's Argument in Support of the Creche Cannot be Reconciled With the Holding in Lynch.*

Petitioner Allegheny County and the Solicitor General suggest that the approach followed below trivializes *Lynch* and transforms constitutional decision making into a banal exercise of counting reindeer. It is an argument that rests on the classic confusion between the forest and the trees. The secular images described in *Lynch* are not significant by themselves; they are only significant because they establish the *context* in which the inherently religious symbol—whether creche or menorah[11]—will be perceived and understood by the general public. In a secularized setting, even religious symbols can be perceived and understood in

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[10]The six factors include (1) the location of the display; (2) whether the display is part of a larger configuration including nonreligious items; (3) the religious intensity of the display; (4) whether the display is shown in connection with a general secular holiday; (5) the degree of public participation in the ownership and maintenance of the display; and (6) the existence of disclaimers of public sponsorship of the display. *County of Allegheny*, 842 F.2d at 662.

[11]For a detailed discussion of the history and meaning of the creche and menorah, see Amicus Brief of the American Jewish Congress pp. 20-22.

secular terms. Removed from their secular setting, the unmistakable impression conveyed by such religious symbols is one of government endorsement for their religious message. This case highlights the importance of that distinction. In *Lynch*, the nativity scene was part of a holiday setting that included both candy canes and Santa's sleigh and reindeer. Indeed, from one vantage point, the reindeer appeared to arc over the creche itself. Comparing the park display in *Lynch* (D. Ex. B, C-1 through C-7, D. *Lynch* Jt. App. pp. 170 through 178) however, with the intensely religious display here (P. Ex. 3-10, J.E.V. 3-7) reveals the disingenuousness of the implicit suggestion that the effect in both displays is the same.

The Solicitor General also suggests that shifting 300 feet from a park to a public building cannot change a legitimate display to one which is prohibited (S.G. Brief at 15). Yet the teaching of *Lynch* is that context is not only important, but critical. To suggest that changes in setting have no impact on the message carried by a display is simply to shut ones eyes to matters of common experience. If "messages" remain the same irrespective of their settings, today's advertisers waste a great deal of money looking for appropriate backdrops for photographs and stage set designers get paid for no reason. Indeed, if one accepts the Solicitor General's argument that the locale of the display makes no difference, then, since the creche here is substantially identical to one found in the Catholic Church, how does moving it from the church setting to the grand staircase of the Allegheny County Courthouse change its religious message?

What the Petitioners and the Solicitor General suggest is that the members of this Court not believe their own eyes. To recognize, as have the Courts of the Third, Sixth and Seventh Circuits, that "the presence of government

in . . . City Hall is unavoidable", *County of Allegheny*, 842 F.2d at 660, quoting *City of Chicago*, 827 F.2d at 128, and that a display of undiluted religiosity within "City Hall" sends a religious message from government, is merely to acknowledge the validity of one's own senses. Petitioners urge, however, that Christmas is different from the rest of the year and that the entire season has become so secularized that any display associated with Christmas is, by definition, non-religious in nature. The flaws in this approach are obvious, both logically and legally. Perhaps most fundamentally, it lacks any limiting principle. If accepted, it would presumably mean that the County could hang a crucifix in its courtrooms during the Christmas season or conduct a daily Mass in the lobby that now houses the creche. Nothing in the Court's Establishment Clause jurisprudence even remotely suggests that such religious behavior on the part of the state would be constitutional.

Second, Petitioners' argument overlooks the critical fact that certain occasions, including Christmas, have both secular and sacred components. The holding of *Lynch* is simply that government may celebrate the secular aspects of Christmas without violating the Establishment Clause. *Lynch* does not hold that government may engage in any religious exercise or display any religious symbol merely because it is Christmas. For similar reasons, the City's and Solicitor General's reliance on *McGowan v. Maryland*, 366 U.S. 420 (1961) is plainly incorrect. The *McGowan* Court upheld the Sunday closing laws because it found that, whatever the religious origins of such laws, they now served the secular function of providing communities with a commonly acknowledged day of rest. *McGowan* does not hold that the state can further that secular purpose by holding an officially sponsored religious service every Sunday. Yet that, in effect, is what Petitioners are seeking here.

The Solicitor General's brief suggests that, somehow because the nativity scene and the menorah are what it terms "passive" symbols that do not coerce the belief or compel the obedience of visitors, that exempts government's speech from the Establishment Clause's prohibitions (S.G. Brief at 8, 22 n.14). Such an "exemption" is not based on this Court's jurisprudence nor should the Court adopt it now. It is one thing to say that government violates the Establishment Clause when it coerces or compels. *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). It is quite another to suggest that *because* government is *not* so coercing, it is then free to speak religious doctrine. If that were the test, there would be no prohibition against a government sign at the Courthouse which pronounced, "Put Christ back in Christmas," so long as citizens were not required to respond "I agree," or a crucifix above the chambers of this Court so long as entrants were not required to genuflect.

2. *The Arguments Advanced In Support of the Menorah Are Inconsistent With Those Advanced In Support of the Creche and Equally Inconsistent With the Establishment Clause.*

While the City of Pittsburgh and Chabad urge approval of the menorah display under *Lynch*, their arguments rest on a reference to context that the County rejects as constitutionally irrelevant. Thus, the City urges that the menorah display is permissible *because* it is accompanied by other holiday objects. In that sense, precisely what the City does is "count reindeer" (City Brief at 12 n.3) and embrace the "St. Nicholas too" test derided by the dissent in *Birmingham*, 791 F.2d at 1569. Thus the City goes to lengths to say it includes signs advertising flower displays and a fund drive in order to embellish its display. Indeed the City likens its advertising signs and tree to *Lynch's*

Santa Claus house, reindeer and candy striped poles, in urging that the displays are "very similar" (City Brief at 12 n.3). To that extent, acceptance of the City's position necessitates rejection of the contrary position of the County and of the Solicitor General.

The City alternately argues, as does Chabad, that its display passes muster under each of the three *Lemon* prongs. It appears to concur with Chabad that placement of the menorah next to a Christmas tree negates any message of government endorsement. Only Chabad's assertion, of course, results from its insistence that the Christmas tree is a Christian symbol which by its very presence assertedly negates endorsement of Judaism. With a startling insensitivity to other religions, neither the City nor Chabad deals with the permissibility of endorsement of Judeo-Christian religions to the exclusion of others.

Chabad's position as to the menorah has two premises which appear to be mutually inconsistent. For its alternate *Larson* argument (discussed *infra* in Section III), Chabad urges that the religious message of Judaism *must* be sent by the menorah so long as the religious message of Christianity is being broadcast by the tree. In its *Lemon* analysis, however, Chabad asserts that the menorah is not a religious symbol and thus presumably sends no religious message. Drawing upon the *Lynch* dissenters' descriptions of the Pawtucket nativity scene, Petitioner Chabad attempts to carve out from *Lemon* a new "exception", that is, that if a government display does not utilize a "sacred object" it is somehow exempt from Establishment Clause prohibitions. The dissent in *Lynch* affords no basis for this argument. While it is true that Justice Brennan recited the nativity scene's meaning as deeply religious, (456 U.S. at 708), and that Justices Blackmun and Stevens decried the misuse of a "sacred symbol" as a "neutral harbinger of the

holiday season . . ." (465 U.S. at 727), in describing why government should be *prohibited* from displaying that sacred religious symbol, a reverse syllogism hardly follows. Thus, Chabad's premise that government should be *permitted* to display non-sacred but undeniably religious objects is founded neither in logic nor in precedent. To the average Pittsburgh citizen, the message conveyed by the City's display comes not from the Talmud but from every day experience. The Court of Appeals, in rejecting Chabad's argument thus, stated:

> [W]e cannot believe that the general public would be aware of the religious fine point made by Chabad and thus view the display of the menorah as a lesser endorsement of religion than that of a Torah scroll or other object regarded as sacred. In any event regardless of the lack of religious significance of a menorah its sectarian character is clear and thus even though it may not be regarded as a sacred object its placement was an endorsement of religion.

County of Allegheny, 842 F.2d at 662.

Respondents readily agree that the case-by-case analysis contemplated by *Lynch* lacks a certain precision. But, the necessity for balancing is hardly unique to the constitutional rule announced by the Court in *Lynch*. Obviously, a rule permitting any religious display during the Christmas season would be clear and easy to apply.[12] But it would not be consistent with the basic premises of the Establishment Clause nor would it solve the next case down the road inevitably involving religious symbols during some other

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[12]Although to suggest the Establishment Clause takes a December holiday illustrates the frivolity of that "construction".

holiday season. To the contrary, it would invite a discordant competitive jousting among religions and sects for advantages of government recognition and approval.

B. The Religious Displays in This Case Also Violate the Purpose and Entanglement Prongs.

Although the Court of Appeals did not reach the first or third prong of *Lemon*, all Petitioners argue that no violation can be grounded in non-secular purpose or entanglement. In fact, this case involves both elements of entanglement that Chief Justice Burger found missing in *Lynch*: a fusion of the roles of government and religious authorities and the risk of sectarian divisiveness.[13]

For the County, its interactions with the Holy Name Society[14] every year have become institutionalized (J.A.

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[13]The circumstances of this case also raise serious questions about the governments' allegedly secular purposes. The secular goals identified in *Lynch* are surely attenuated when, as here, the County chooses to put up a purely religious display. The City's purpose in erecting the menorah is equally suspect. It is undisputed that Chabad's request to place a menorah in front of the Pittsburgh City-County Building was prompted by a call from Chabad's spiritual leader to light the menorah publicly as part of a "war against the forces of assimilation, helping Jews around the world to rediscover the eternal truths of Torah Judaism" (P. Ex. 18, J.E.V. 20). The Establishment Clause surely means government may not lend its support to a religion's search for additional adherents. Nor, on this record, should the state be permitted, without any test or screening, to absolve itself of *religious* purpose by claiming it acts merely as a passive conduit. Moreover, the Mayor's letter referencing his concern only for "Jews and Christians" seems clearly to exclude other religions and non-religions (P. Ex. 2, J.E.V. 2, J.A. 90).

[14]Father Swiderski testified that "[t]he Holy Name Society is a national organization of Catholic men established to promote the veneration for the name of Jesus . . ." (J.A. 73). The Society was founded in the thirteenth century "to exhort the faithful to increased reverence for the name of the Redeemer, and thus to make reparation for and to counteract the prevalent profanity and blasphemy," an undertaking it

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73-74). Unlike the city in *Lynch*, the County defers entirely to Father Yurko in putting up the nativity scene. This is a delicate function since, as shown above, the content and design of the display necessarily affect its legality. Yet the County totally relinquishes this public function to Father Yurko who insists on doing "everything himself" (J.A. 165),[15] and whose dedicated purpose is in increasing veneration for Jesus Christ. Not surprisingly, the clergyman did not place the creche figurines among sleighs, toys and Santas, put up multiple strong disclaimers, or move the items to a more neutral site—concerns that a government must take into consideration. For precisely this reason, this Court has consistently condemned such ongoing relationships between government and religion, *e.g. Aguilar v. Felton*, 473 U.S. 402 (1985), particularly with pervasively sectarian groups, *e.g., Roemer v. Board of Public Works*, 426 U.S. 736 (1976).

Allowing Father Yurko complete control over the display also implicates the entanglement doctrine which prohibits vesting government powers in religious bodies. *Larkin v. Grendel's Den*, 459 U.S. 116 (1982); *School District of the City of Grand Rapids v. Ball*, 403 U.S. 373 (1985). Significantly, the entanglement shows signs of increasing. County funds now pay for the poinsettia frame which its employees place (J.A. 204).[16] Additionally, community exposure shows evidence of growth. No longer

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(Continued)

continues to perform. It promotes "public manifestation of respect for Christ's name . . ." 7 *New Catholic Encyclopedia*, 79 (1967).

[15]This was contrary to the practice approved by the Court in *Board of Education of Central School District No. 1 v. Allen*, 392 U.S. 236, 244-245 (1968) where the decisive factor was that public rather than religious authorities were making ultimate curriculum choices.

[16]George Thomas who was in charge of the display testified that he knew of no out of pocket expenses (J.A. 166). This misimpression

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simply a carolling site, it is an orientation point for school children on tours of the courts (J.A. 95) (P. Ex. 8, J.E.V. 6, J.A. 95, 101), and the site for a minister's invocation dealing with the POW's and MIA's (J.A. 160, 190).

The City maintains that its display of the menorah was not entangling because there is no evidence that the display "engenders political divisiveness or a potential of political divisiveness." (City Brief at 16-17). Chabad agrees that "since no subsidies are involved, there is no possibility much less likelihood of political pressure to increase benefits for one faith at the cost of another, or to benefit religion generally at the expense of atheists or others who are non-religious." (Chabad Brief at 14). In examining religious symbols this Court has never suggested that benefit to religion is measured solely in terms of an accountant's balance sheet. See, e.g. *Stone v. Graham*, 449 U.S. 39 (1980).

Furthermore, the disagreement among members of the Jewish religion as to the issues here will inevitably lead to government entanglement. While Chabad's witness, Rabbi Rosenfeld, testified in favor of the menorah display, (J.A. 225-306), Rabbi Staitman testified in opposition (J.A. 136-148). Likewise, while Chabad/Lubavitch approves the display, the Anti-Defamation League represents a party who objects. This Court stated its intent to stay out of such sectarian debates in *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. at 716 (1981). Similarly, many Jewish groups strongly disagree with

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regarding the allocation of funds by the person normally in charge reflects questionable practice since government "aid [to religion] must be supervised to ensure no entanglement." *Aguilar*, 473 U.S. at 421 (Rehnquist, J. dissenting).

Chabad's characterization of the menorah. This Court cannot and should not be in the position of resolving theological disputes over what is or is not a religious object. *Cf. Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94 (1952).

II. THE COUNTY AND CITY DISPLAYS VIOLATE THE ENDORSEMENT CRITERIA ARTICULATED BY JUSTICE O'CONNOR IN HER CONCURRENCE IN *LYNCH*.

Because Petitioners either confuse or ignore the distinction between the secular and the sectarian that was vital to the majority opinion in *Lynch*, they also misapprehend the essence of the endorsement analysis articulated in Justice O'Connor's concurring opinion. The Pawtucket creche did not represent an endorsement of religion because its content and context did not convey a sectarian message. The content and context of this creche are markedly different and, as the court below found, convey an entirely sectarian message. Indeed, Justice O'Connor's articulation of the endorsement issue was prophetic as to the effect of the displays here.

> Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.

Lynch, 465 U.S. at 688 (O'Connor, J. concurring).

The nature of that message was perhaps best conveyed in this case by Howard M. Elbling, a law clerk for one of the state court judges, who described his feelings as a Jew compelled to walk past the creche several times a day on

his way to and from work. According to Elbling, these repeated viewings,

> . . . evoked in me a feeling that I was part of a minority . . . a memory of middle ages time when my people were persecuted and forced to live in guettos (sic) (J.A. 125).

Respondent Malik Tunador, a Moslem, appeared at the Courthouse to renew his passport (J.A. 109). There, he encountered the creche, a personification of the deity prohibited in the Moslem religion since the deity "is not a tangible being. God is omnipresent everywhere all the time, and the depiction of this concept in a tangible form is completely forbidden in Moslem religion" (J.A. 110).

Respondents' reaction is not unique to Allegheny County. As Dean Redlich has written: "When I see a government-supported creche, I suddenly feel as if I have become a stranger in my home, to be tolerated only as long as I accept the dominant religious values."[17] That message was conveyed with stark clarity by the undiluted religiosity of the Allegheny County creche.

Nor is it an answer to say that the County did not intend to convey a message of religious endorsement. Even assuming that is true for purposes of argument, it only responds to half the problem. As Justice O'Connor observed in *Lynch:*

> If the audience is large, as it always is when government "speaks" by word or deed, some portion of the audience will inevitably receive a message determined by the "objective" content of the statement, and some portion will inevitably receive the intended message. Examination of both the subjective and the objective components

[17] *See* Tribe, American Constitutional Law, at 1293 n.66 (1988).

> of the message communicated by a government action is therefore necessary to determine whether the action carries a forbidden meaning.
>
> The purpose prong of the Lemon test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid. 465 U.S. at 690 (O'Connor, J. concurring).

The County argues that the religious impact of this particular creche was blunted by the presence of a sign noting that the creche had been donated by the Holy Name Society. It is difficult to understand how the reference to an overtly sectarian group blunts the religious message of a creche located within the seat of government. In any event, the Third Circuit found that this single placard neither distanced the County from the creche nor secularized the display. *County of Allegheny*, 842 F.2d at 662.[18]

The Menorah also fails to pass muster within Justice O'Connor's framework for analyzing endorsement. Petitioners, City of Pittsburgh and Chabad, suggest that the menorah's display does not convey a prohibited message. Analysis of their argument reflects its invalidity. Chabad's argument is premised on its unsupported assertion that a Christmas tree is a Christian symbol, thus neutralizing any religious message communicated by the menorah. The message of full religious toleration which Chabad asserts

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[18]One witness understood the sign to mean that the Holy Name Society had made a gift of the creche to the County (J.A. 126). The sign also did not diminish the ecclesiastical impact of the display for some since Holy Name Society signs are similarly found in churches (J.A. 95).

results from the Christmas tree and menorah's standing side by side (Chabad Brief at 17), clearly admits the Jewish religious message "sent" by the menorah. With this Respondents agree. The "full religious toleration" which follows for Chabad, however, presupposes this Court's acceptance of the concept that a Christmas tree is a "Christian symbol." That this argument has not been preserved for appeal is argued *infra* in section III. Should this Court refuse to accept Chabad's premise, then the sole message which is sent is that of approval of the Jewish religion.

Even accepting Chabad's analysis, the City's display fails the endorsement standard since the message is sent to nonadherents of the Jewish or Christian faiths that *they* are "outsiders, not full members of the political community ..." with the accompanying message to Jews and Christians that they are "insiders".[19] *Lynch*, 465 U.S. at 688 (O'Connor, J. concurring).

The district court's opinion emphasized that the menorah conferred special status on the Jews within the community. "It may call to the attention of the public that jews (sic) also have a miracle to remember."[20] (Opinion of Judge McCune, City Cert. Pet. 42a). The *insider* message transmitted is compellingly expressed in the letter of Marlaine Darfler, reprinted in Chabad's publication, Let There Be Light, as to her reaction to a similar menorah display,

> ".... there, for all to see, was my symbol, an affirmation of my faith ... I felt so proud, so recognized."

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[19]The comparative size and placement of the tree and menorah, however, raise serious questions that one is regarded as better or more important than the other.

[20]The Court gave no explanation for its puzzling suggestion that a "miracle" may be secular.

(P. Ex. 18; J.E.V. 24). Thus, the City and district court gave Chabad (and its message) the official recognition it sought.

III. *LARSON v. VALENTE* DOES NOT REQUIRE DISPLAY OF A MENORAH.

A. Petitioner Chabad's Argument.

Petitioner Chabad argues that *Larson v. Valente*, 456 U.S. 228 (1982) requires the City to display its menorah since it displays a Christmas tree (Chabad Brief at 27-30). Building on *Lynch's* rejection of *Larson's* application to the Pawtucket display, the Solicitor General disagrees and asserts that no counter-balancing of a religious holiday display is required by *Larson* (S.G. Brief at 20 n. 13). Neither position is correct.

1. *Chabad's Current Position Has Not Been Preserved For Appeal.*

The position now urged by Chabad was never asserted in the district court. Neither its petition to intervene (J.A. 35) nor its evidence at trial made any reference to its current argument that the Christmas tree is a Christian symbol (J.A. 211-318).[21] It is hardly surprising, therefore, that there is no evidence in this record as to whether other religious denominations have requested representation in

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[21]In the Court of Appeals, not relying on *Larson*, Chabad attempted to assert an argument that Jewish residents have a right to display their symbol if Christian symbols are displayed. The City moved to strike since the issue had not been raised below (see Motion of City of Pittsburgh to Strike Portion of Brief of Intervenor—Appellee, Chabad, Nov. 24, 1987). The Court of Appeals deferred consideration of the City's motion until its consideration of the merits (see Order of Court, December 7, 1987). Although it issued no ruling on the motion, the Court of Appeals did not address Chabad's argument in its opinion.

the City's display.[22] Chabad's recitation that "none" have made such a request (Chabad Brief at 29), is unsupported by citation to the record because there is no such evidence. Under these circumstances, the *Larson* argument made by Chabad is not properly before the Court and should not be considered. "Ordinarily this Court does not decide questions not raised or involved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981). Moreover, given the prohibition that "Congress shall *make no law* . . . ", there appears no justification for the notion that the government *may* act to foster one or two religions until another religion asks for inclusion as well.

2. *If The Tree Is A Christian Symbol Chabad's Solution Compounds The Problem.*

Assuming that Chabad could properly here assert that the Christmas tree is a symbol of Christianity,[23] Chabad's proposed cure (adding a menorah) not only does not solve the problem, it invites its proliferation. Similarly, even if the Solicitor General's brief had correctly stated the "question presented"[24] so that the menorah and creche were together in one display, the Establishment Clause violation persists. The denominational preference for Judeo-Christianity, as opposed to other religions and agnosticism and atheism, that *Larson* denounced would still remain.

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[22]There was a request, not cited by Chabad, that the City and County refrain from erecting religious symbols in their buildings and pointing out "that one religion's symbol is another religion's heresey . . . " (P. Ex. 1, J.E.V. 1, J.A. 89).

[23]Respondents take no position on this issue but note that some court dicta have indicated to the contrary. *American Civil Liberties Union v. City of St. Charles*, 794 F.2d 265, 271 (7th Cir.), *cert. denied*, 479 U.S. 961 (1986); *City of Chicago*, 827 F.2d at 127.

[24]It does not. The assertion that the nativity scene and the menorah are included in *a* display is apparently based on an unfamiliarity with the actual record here.

Moreover, viewing this sort of combination either singly or as part of a package is likely to plunge cities into a vortex of demands and counter-demands from one religion after another.[25] Respondents suggest that if the tree is a Christian symbol, the only solution compatible with the Establishment Clause is to remove it.

B. The Solicitor General's Position That No Counterbalancing Is Required Is Unsupported By Law.

In *Lynch*, 465 U.S. at 687 n.13, former Chief Justice Burger rejected the First Circuit's use of the *Larson* "strict scrutiny" test since the display in that case did not appear to be explicitly discriminatory. Justice O'Connor concurred, noting that the Pawtucket display did not involve an intentional discrimination among religions. *Id.* at 688, n.13. Of course, these observations in *Lynch* must be read in the context of the Court's conclusion that the Pawtucket creche was displayed in a setting that largely denuded it of religious significance. Ignoring this fact, the Solicitor General argues that, since it is not possible to give uniform recognition to all religions in the context of commemorating religious holidays, no counterbalancing is required. No analysis is made of the establishment problems inherent in selecting only certain religions to commemorate. Is there some lesser standard to apply to constitutional prohibitions in December? And if the government may display Christian and Jewish religious symbols in December, must it not similarly display in September the elephant headed

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[25] *Edwards v. Aquillard*, ___ U.S. ___, 107 S.Ct. 2573, 2589 n.6 (1987), notes some 1,347 religious organizations enumerated in the Encyclopedia of American Religions. The Pittsburgh religious community is diverse. In addition to Jews and Christians, it includes, at least, Moslems, Hindus and Unitarians (J.A. 132-133).

god for the Hindu holiday of Ganesh Chaturthi and Buddhas decorated with flowers and monks' robes for the Buddhist holiday of Bodhi Day which in 1988 fell in September? And what of religions that have no symbols?

No Justice disagreed with the assertion in *Larson*, 456 U.S. at 244, that the "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." Justice O'Connor in her concurrence in *Lynch*, 465 U.S. at 688 n.13, reaffirmed her adherence to the *Larson* standard. In *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) this Court, in striking down a Connecticut statute which gave favored treatment to Sabbath observers, stated: "This unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion clauses. . . ." 472 U.S. at 710.

The Solicitor General summarily dismisses the mandates of *Larson*, simply stating "it is not possible for the government to give uniform recognition to all religions in the context of commemorating a holiday with specific meaning for one or more religions." (S.G. Brief at 20, n.13). That admission is exactly the point. It does not, however, lead to the conclusion that, in such situations, *Larson* should be ignored. Once the Solicitor General's view is accepted, isn't the inexorable result that, since government must maintain neutrality among religions, it should not select *any* for special recognition?

To permit government to display Christian symbols without Jewish symbols, or Christian and Jewish symbols while ignoring other religions, is to foster the most divisive sort of preferential treatment of religion in a pluralistic society.

IV. THE RELIGIOUS DISPLAYS IN THIS CASE CANNOT BE JUSTIFIED AS AN HISTORICAL EXCEPTION TO THE ESTABLISHMENT CLAUSE OR AS A PERMISSIBLE ACCOMMODATION OF RELIGION.

As a fallback position, Petitioners argue that even if the religious displays in this case are in fact sectarian, and even if they in fact convey a message of religious endorsement, they can be upheld as either a permissible accommodation of religion or another benign example of this nation's historic acknowledgement of religion. Neither argument withstands scrutiny.

A. The Religious Displays In This Case Cannot Be Characterized As Merely A Benign Acknowledgement of Religion.

Our opponents' effort to describe the displays of the creche and menorah at issue in this case as a benign acknowledgment of religion—akin to the words "In God We Trust" on the nation's currency (S.G. Brief at 11) is flawed on at least three grounds. First, the practice of erecting religious displays within the core buildings of government has not been validated by history. To the contrary, it is clear that the framers of the First Amendment were deeply suspicious of any effort to coerce religious observance by placing religious symbols in a setting where public attendance is often required and sometimes compelled. Second, both the creche and menorah are inherently denominational in character. Third, the Constitution prohibits even non-preferential support for religion. None of the historically sanctioned exceptions to the principle of church-state separation apply to the facts of this case.

1. *There Is No Historical Practice Of Erecting These Religious Displays In Government Buildings.*

In *Marsh v. Chambers*, 463 U.S. 783 (1983), the Court rejected an Establishment Clause attack on a legislative chaplaincy where it found an unbroken tradition of utilizing such clergy dating to the beginning of our national life. The practice had become a "part of the fabric of our society." *Id.* at 792. No similar claim can be made regarding the placement of nativity scenes within courthouses or the mounting of Jewish menorahs on city halls. Display of these Christian and Jewish symbols is of relatively recent vintage in Pittsburgh, dating respectively from 1981 and 1982. *See, County of Allegheny*, 842 F.2d at 657. Moreover, there is no salient national tradition utilizing the creche in public celebrations of Christmas[26] much less one of posting the Chanukah menorah at the town hall. Because Jews were few[27] in early America and deemed "second class citizens" (T. Curry *The First Freedoms* 90-91 (1986)) such a display would have been unimaginable at the time. Inasmuch as anti-Catholic sentiment was alive in the colonies and in the early American nation[28] a creche in a county courthouse would have been equally astonishing. Even Lord Baltimore who had established Maryland as a haven for Catholics decreed that their acts "be done as privately as may be." Curry, *supra* at 35. In the New England puritanical tradition a public celebration of Christmas would have been a sacrilege. *Lynch*, 465 U.S. at

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[26] *See Lynch*, 465 U.S. at 694 (Brennan J. dissenting).

[27] There were approximately 2,000 Jews in America in 1776. 2 Encyclopedia Judaica 1810 (1976).

[28] See Curry at 80. Catholics were feared as a fifth column in the French and Indian wars in the mid-eighteenth century. The Quebec Act enabling the Catholic church to sue to enforce tithes in Canada was a principal grievance which the Continental Congress directed to Parliament in 1774, claiming that the effect was to "establish the Popish religion." L. Pfeffer, *Church, State, and Freedom* 157 (1967).

720-723 (Brennan, J. dissenting). In short, the public displays at issue are not in keeping with any long standing tradition.

Furthermore, in the instant case, the displays were placed centrally within the Courthouse and on the front exterior of the City-County Building. For many people, including jurors, witnesses and lawyers, these places are compulsory destinations where by virtue of these displays they unavoidably must encounter religious symbolism.[29]

The unbroken tradition of protection against religious coercion spans the colonial and modern eras. In Pennsylvania, the Frame of Government of 1682 specified that "no person . . . shall at any time be compelled to frequent . . . any religious . . . place or ministry whatsoever . . . " Curry, *supra*, p. 75. The time was not restricted to the hours of worship services. The term "place" was chosen as opposed to church. Equivalent language appeared in the Virginia Bill for Religious Liberty which provided:

> "That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief . . . ". 12 Henig, Statutes of Virginia (1823) 84; cited in *Everson v. Board of Education*, 330 U.S. 1, 13 n.14. (1947).

As this Court has recognized: "The provisions of the First Amendment . . . had the same objective and were

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[29]In *Zorach v. Clauson*, 343 U.S. 306, 314 (1952), the Court held that: "Government may not . . . use secular institutions to force one or some religion on any person." See also, Curry, *supra* at 75-76.

intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute." *Everson*, 330 U.S. at 13.

Courts have been vigilant about keeping religion voluntary and coercion-free. Compulsion has been prohibited even if subtle, unintended or indirect. Tribe, *supra* at 1160. Even long accepted practices have been barred, such as compulsory chapel attendance at service academies, *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir. 1972), and voluntary school prayer in compulsory settings. *Abington, supra*. Notwithstanding that praiseworthy public goals have been articulated (community education through shared time), the Court has declined to allow a practice placing students and teachers amidst sectarian symbols. *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985). It has declined to place believers into blasphemous environments. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). One need not attend religious activities in Veteran's Hospitals, 38 C.F.R. Sec. 17.34(a), or even Federal prisons, where involuntary "exposure" to religious material in the cell block has been prohibited. *Campbell v. Cauthron*, 623 F.2d 503 (8th Cir. 1980).

Petitioners in their briefs avoid dealing with the compulsory and coercive qualities of a courthouse and city hall. They would have the Court treat all types of public property in the same manner. Adoption of Petitioners' position, however, would enable government to coerce seasonal encounters with sectarian materials, a situation neither contemplated by the framers, nor ever previously countenanced by this Court.

2. *This Court's Occasional Willingness To Tolerate Neutral References To Religion Does Not Apply To The Inherently Denominational Displays In This Case.*

Although government may acknowledge religion, it ordinarily must avoid the highly sectarian or sacral elements of faith. In Zorach, 343 U.S. at 313, this Court stated that, "We are a religious people whose institutions presuppose a Supreme Being." It did not say that, "We are a people whose institutions presuppose the divinity of Jesus Christ" or "a people whose institutions presuppose the Chanukah miracle visited upon the Jews." In permitting legislative chaplaincy, this Court pointed out that, in fact, the clergyman had desisted from offering opening prayers that named Jesus. *Marsh*, 463 U.S. at 793 n.10.

Permissible publicly supported religion reflects the basic faith of the American people, but avoids specific ideology and the "ultimacy or formal structure of traditional sacral religions." Mirsky, Civil Religion and the Establishment Clause, 95 Yale L. J. 1237, 1250 (1986). In prior cases this Court has recognized and drawn the necessary line between civic piety and ideology. For example, it has proscribed the use of a specific "sacred text". *Stone v. Graham*, 449 U.S. 39 (1980); *Abington, supra.*

In pointing to current religious displays on government properties to justify its nativity display, the County identifies Moses with the Ten Commandments in this Court's chambers (County Brief at 25, n.4). Surely there is a vast difference between a figure which is part of a marble frieze at ceiling height, celebrating the majesty of the law, including, along with Moses and the decalogue, a procession of numerous other historical lawgivers as divergent as Draco, Hammurabi, Confucius and Solon and the nativity scene here.

William Van Alstyne has articulated the analytically helpful concept that while some governmental use of religion is lawful, "the [establishment] clause disallows civil government to appropriate that which is established by religion . . . "

> Every act by the state that appropriates from religion is necessarily profane. The very word, "profane," conveys the essential idea. It means "outside the temple," from "pro" [before] and from "fanus" [the temple], from which the state has taken and thus made profane by its relocation and its secularly ensconced use. So, as an example, one may be offended by state appropriative uses of the Latin cross: when taken outside the church and made a part of the civil state's own equipment, the cross is by that act, profaned.[30]

The City and County have appropriated the nativity scene and menorah from the religions which established these miraculous symbols within their own voluntary communities of faith and utilized them for centuries at the church, the synagogue and in private worship. This appropriation constitutes a breach of the Establishment Clause. The destructive potential for religion from its exploitation by government was referenced by Father Swiderski when he testified that, "There are many people also who have called, for instance, Pittsburgh City Council a circus, and to have a religious symbol related to that building would seem inappropriate" (J.A. 80).

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[30]Van Alstyne, What Is "An Establishment of Religion"? 65 N.C.L. Rev. 910, 914 (1987).

Moreover, one of the dangers portended when government unnecessarily employs religious tools is that government may thus put itself on a religious pedestal.[31] Since religion is fundamental to so many people there is a danger that religion can become "an irresistibly useful instrument of state policy."[32] Thus the obverse of cloaking religion with the power and prestige of government is that we may reinforce government with the aura of religious faith and authority. Where government then is allowed to associate itself with special symbols of religious sanctity, there is a subtle message conveyed that when citizens criticize government, they also criticize the Almighty. Father Swiderski gave the example of Iran as a country where religion and politics have mixed (J.A. 81). This very example has been described by playwright, Arthur Miller in these words:

> A Khomeini in our day is impossible to controvert, let alone dislodge, because he has achieved a total identification of religion with his political regime, so that to oppose him is to oppose God.
>
> N.Y. Times March 12, 1984 at A 17.

3. *The Constitution Prohibits Even Non-Preferential Support For Religion.*

Some analysts, such as Chabad, take the view that the Establishment Clause was intended only to prevent government from preferring or establishing a single religion. Historically, it seems improbable that a non-preferential view motivated the Framers in creating the Establishment Clause.

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[31]This is one of seven dangers described in Tribe, supra at 1286-1288.

[32]Van Alstyne, Trends in the Supreme Court Mr. Jefferson's Crumbling Wall—A Comment on *Lynch v. Donnelly*, 1984 Duke L.J. 770, 786.

In colonies with established churches, non-preferential aid schemes were attempted to allow minorities to restrict their taxes to support of their own churches and clergy. These plans often led to repression and were unpopular with minorities such as Baptists in New England. *See*, Curry, *supra*, at 165-176.

A relatively benign form of non-preferentialism became the subject of a decade's debate in Anglican Virginia where the proposed establishment would have included Catholics in addition to Anglicans and accommodated Mennonite objections to paid clergy. Madison published his *Memorial and Remonstrance* to marshall resistance to the proposed legislation. Presbyterians and Baptists also circulated petitions in opposition to the bill which died without a vote. Instead, the legislature passed Jefferson's Act for Establishing Religious Freedom which rejected all forms of establishment. "Thus the great debate about disestablishment in Virginia culminated in a decisive vote. . . ." *See Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. and Mary L. Rev. 875, 897 (1986).

Other colonies also were unreceptive to notions of non-preferentialism. A tax bill similar to that proposed for Virginia, though even more liberal and less preferential, was rejected in Maryland in 1785. Georgia had a non-preferential tax but declined to collect it and then abolished it. The Framers knew that non-preferential laws caused strife. *Id.* at 899-902.

In some respects the Virginia debate was a dry run and springboard for the First Congress' consideration of the treatment of religion in the First Amendment, whose principal draftsman was Madison. *Id.* at 899. Congress rejected non-preferential models which were embraced in two early drafts.

> Congress shall make no law establishing one Religious Sect or society in preference to others, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed;

and

> Congress shall make no law establishing any particular denomination or religion in preference to another, or prohibiting the free exercise thereof, nor shall the right of conscience be infringed.

Journal of the First Session of the United States Senate (Sept. 3, 1789).

Obviously, if non-preferentialism and freedom of conscience were its only goals, Congress could have adopted either of these drafts. As this Court has recognized, the Framers intended no powers for the federal government in religion, which included a broad ban on aid to single or numerous faiths.

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. *Everson*, 330 U.S. at 15.

B. The Religious Displays In This Case Go Far Beyond Any Permissible Accommodation Of Religion.

In a series of decisions, this Court has recognized that the state may "accommodate" religion without offending the Establishment Clause if the "accommodation" is limited to removing state-imposed burdens on the free exercise of religion. *See, e.g., Corporation of Presiding Bishop of the Church of Latter Day Saints v. Amos*, ___U.S. ___,

107 S.Ct. 2862 (1987); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Zorach, supra.*

Relying on this doctrine, Petitioners suggest that the state's willingness to erect a creche and menorah in this case represents nothing more than an accommodation of religion. A similar argument was made by the State of Alabama in *Wallace v. Jaffree*, 472 U.S. 38 (1985), in an attempt to defend its moment of silence law. Justice O'Connor's response to Alabama's position is equally applicable here:

> If we assume that the religious activity that Alabama seeks to protect is silent prayer, then it is difficult to discern any state-imposed burden on that activity that is lifted by [the Alabama law]. No law prevents a student who is so inclined from praying silently in public schools . . . Of course, the State might argue that [its law] protects not silent prayer, but rather group silent prayer under State sponsorship. Phrased in these terms, the burden lifted by the statute is not one imposed by the State of Alabama, but by the Establishment Clause . . . In my view, it is beyond the authority of the State of Alabama to remove burdens imposed by the Constitution itself. . . .

Id. at 83-84 (O'Connor, J., concurring).

Likewise, no state-imposed burden prevents citizens of Allegheny County from celebrating Christmas or Chanukah. Here, as in *Jaffree*, if the burden that petitioners seek to lift is the prohibition against official observance of religious holidays with sectarian symbols, that burden is "imposed by the Constitution itself." *Id.*

V. THE PUBLIC FORUM DOCTRINE PROVIDES NO JUSTIFICATION OF THE RELIGIOUS DISPLAYS HERE.

At the conclusion of its brief, Petitioner Chabad makes an effort to define the City Hall steps area as "public forum" (Chabad Brief at 30-31)[33] in the manner of the park in *McCreary v. Stone*, 739 F.2d 716 (2d. Cir.) *aff'd.* by an equally divided court sub. nom., *Board of Trustees of the Village of Scarsdale v. McCreary*, 471 U.S. 83 (1985).[34] The City of Pittsburgh, which controls the relevant portion of the City-County Building, disputes Chabad's position. The record does not reflect that the City has opened its front steps or walls for public expression. Indeed, a Pittsburgh City Ordinance provides that property under City control is not open for political or commercial displays.[35]

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[33]Chabad suggests that it did not have sufficient opportunity to develop this position below. Chabad was permitted to intervene and to present evidence (J.A. pp. 61, 211). In fact, Chabad's counsel withdrew his question using the term "public forum" and indicated, "we'll argue this in briefs, I guess" (J.A. 234-236). The question was not briefed or argued below by Chabad.

Chabad's present position is based on vague testimony that there was a deomonstration "brought to" the City County Building (J.A. 244). No testimony evidences how close the demonstrators were to the steps themselves, how long they remained, or whether the City even knew of the demonstration. Demonstrations outside a Courthouse of limited duration hardly require that the Court permit placement of religious symbols on a Courthouse entrance continuously during a six week period.

[34]The Second Circuit held that placement of a creche in a municipal park did not violate the Clause. Significantly, the display did not take place within the trappings of a government center, but was a private exhibit of only two weeks duration held in a traditional public forum. As such, unlike the present situation, the Scarsdale display lacked the imprimatur and coercive aspects of government.

[35]*See* Pittsburgh Municipal Code (419.04. *Business and Political Advertising)*, which states *inter alia* that:

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Petitioner Allegheny County also implies that the placement of the creche in a "gallery/forum" validates the display.[36]

The sites used for the menorah and the creche were not public forums[37] under this Court's analysis of the spectrum of public places. The first category includes "quintessential public forums", traditionally streets and parks where the government may not prohibit access but may enforce regulations of time, place and manner. The second category outlined is public property which the state may open up for expressive activity. The third category consists of property which is not a public forum. *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983); *Hague v. CIO*, 307 U.S. 496 (1939); *Schneider v. State*, 308 U.S. 147 (1939).[38]

(Continued)

> No person shall display any advertising matter on any property which is owned or controlled by the City for either business or political purposes and no display shall be made in connection with any municipal, state or national election of pictures or written matter relating to the various candidates for office.

[36]County Brief at 30-33. Respondents reject the "gallery forum" as an accurate terminology to describe the Courthouse's interior.

[37]The forum positions taken by Chabad and vaguely implied by the County are anomalous and irrelevant to consideration. Inasmuch as the displays of the menorah and the creche were City and County displays, they amount to speech by the respective governments themselves. The Establishment Clause is "the only substantive constitutional constraint on what governments say." M. Yudof, *When Government Speaks: Politics, Law and Government Expression in America*, 214 (1983). *Lynch* has taught that even if placed in a park, a government's religious display still will be judged by its components and context.

[38]The properties here are not analogous to that in *Widmar v. Vincent*, 454 U.S. 263 (1981). There, in striking down a university regulation prohibiting the use of buildings and grounds for purposes of religious worship or teaching, the Court held that the separation of church and state is a compelling state interest, but that a policy of equal access in a university does not offend the Establishment Clause as that setting

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Apparently, the County's implication is that some use of the adjacent gallery by the public converts the grand staircase into the second type of public forum. However, some selected use, which is here the case since the government screens the artwork for quality and theme before choosing to display it, (J.A. 201-203) "does not transform government property into a public forum." Perry, 460 U.S. at 47, *citing Greer v. Spock*, 424 U.S. 828, 838 n.10 (1976). Even if the second type of limited public forum were present, that factor means only that "entities of a similar character" could have access to the salient venue. *Perry*, 460 U.S. at 48. The Holy Name Society donating the creche with its religious message bears no resemblance to artists who submit their works for screening and display in the adjacent Courthouse gallery.

There is no dispute between Respondents and the City that the front face of the City-County Building is a non-public forum (J.A. 235-236). The City had the right and indeed was bound by local ordinance to reserve the building for the core functions of government. "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Perry*, 460 U.S. at 46, quoting *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114 at 129-30, quoting *Greer v. Spock*, 424 U.S. 828, 836 (1976), in turn quoting *Adderley*

(Continued)

"does not confer any *imprimatur* of state approval of religious sects or practices." *Id.* at 274 (emphasis added). The religious uses of the City-County Building and Courthouse were more publicly prominent that in *Widmar*, and, because of the core governmental functions, conveyed a much stronger message of endorsement. Moreover, the students in *Widmar* were under no compulsion to attend college or be exposed to the religious matter. The *Widmar* situation, unlike those at issue, was unquestionably voluntary.

v. Florida, 385 U.S. 39, 47 (1966). Moreover, there is evidence that restricting the premises to their intended use has not been shown to force those wishing to have a display to utilize more costly channels. *Martin v. City of Struthers*, 319 U.S. 141 (1943); *City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

Finally, no finding of a public forum is required by *United States v. Grace*, 461 U.S. 171 (1983) in which a statute was held unconstitutional insofar as it banned expressive activity involving the Supreme Court's sidewalks.[39] The relief sought by Chabad and the County would permit round-the-clock displays unrelated to governmental functions in the Courthouse and at the head of the raised steps and front wall of the City-County Building. Such a result would go well beyond *Grace*, and other First Amendment precedent, and force local governments to renounce regulations based upon reasonableness.

The menorah at issue did not rest on a sidewalk that was indistinguishable from other city sidewalks but stood atop the City-County Building steps and was attached to a main front column of that edifice. To declare this portion of the premises a public forum would open it to other displays and signage on a long-term basis. Nor, in *Grace*, did the Court deem its interior to be a public forum for expressive activities or displays, or suggest that its front columns were appropriate sites for hanging sectarian symbols.

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[39]In *Grace*, 461 U.S. at 183-184, the Court stated that "[t]here is nothing to indicate to the public that these sidewalks are part of the Supreme Court grounds or in any way different from other public sidewalks . . . ". The Court did not overturn the legislation insofar as it applied to the remainder of the Court's premises.

CONCLUSION

> "Symbolism is a primitive but effective way of communicating ideas . . . a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 632.

Petitioners urge this Court to extend its holding in *Lynch* to permit governmental displays of deeply religious symbols not only at core government buildings but even within its courthouses. In so doing they ask this Court to ignore the divisive effect of such displays on objective observers, as documented in this case. For that reason Petitioners' effort to defend their displays as an illustration of religious pluralism in America is fundamentally misguided. It is precisely because this nation celebrates its citizens' rights to diverse religious beliefs that government should be precluded from embracing the message of one or more to the exclusion of others.

Surely the attraction of a "bright line" test should not be used to overcome those prohibitions on government so carefully imposed by the framers. Far from preserving respect for religious diversity in our pluralistic society, allowing government to now begin using religious displays in core government buildings endangers it. "It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding

these beginnings." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 641 (1943).

Respondents urge therefore that the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

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